

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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The United States of America, )  
Plaintiff, ) File No. 17-cv-136  
v. ) (PAM/FLN)  
KleinBank, ) Courtroom 9W  
Defendant. ) Minneapolis, Minnesota  
September 22, 2017  
9:34 a.m.  
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BEFORE THE HONORABLE FRANKLIN L. NOEL  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
**(MOTIONS HEARING)**

APPEARANCES

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1                                   P R O C E E D I N G S

2                                   IN OPEN COURT

3  
4                   THE COURT: Good morning. Please be seated.

5                   Okay. This is *The United States versus KleinBank*.  
6 Let's get everybody's appearance on the record.

7                   For the government.

8                   MR. BELEN: Good morning, Your Honor. Christopher  
9 Belen on behalf of the United States, and Ernestine Ward is  
10 also here from the Department of Justice.

11                  THE COURT: Welcome.

12                  MR. LUNDQUIST: Good morning, Your Honor. John  
13 Lundquist and Anu Sreekanth for the defendant KleinBank.

14                  And I would like to also introduce -- well, Joseph  
15 Witt is here for the amicus.

16                  I was going to actually introduce Doug Hile, who  
17 is the CEO of KleinBank, and Stephen Spears, senior  
18 vice-president in charge of mortgage lending, among other  
19 matters.

20                  THE COURT: Okay. Mr. Witt.

21                  MR. WITT: Joseph Witt on behalf of the amicus  
22 group.

23                  THE COURT: Okay. So we are here for a hearing on  
24 the defendant's motion to dismiss, correct?

25                  MR. LUNDQUIST: That's right.

1 THE COURT: Mr. Lundquist.

2 MR. LUNDQUIST: Thank you, judge.

3 So I'll start with a little background about  
4 KleinBank. KleinBank is an independent community bank.  
5 It's based in Chaska, Minnesota. It has served that part of  
6 the community, the western part of the metro area, for over  
7 a hundred years. It has focused that entire time, all the  
8 way up through the present, on smaller markets, suburban and  
9 rural markets. That's been its business strategy. It's  
10 family-owned by the Klein family. It's the fourth  
11 generation, I believe, currently. And I know from speaking  
12 with family members that they take this matter extremely  
13 seriously and very personally.

14 The bank has a good reputation in the community.  
15 They have a good reputation with their regulators. They  
16 have never been cited for any redlining or discriminatory  
17 lending practices by FDIC or anyone else in their entire  
18 history. The complaint, of course, alleges exactly that,  
19 violating fair lending laws, basically the Equal Credit  
20 Opportunity Act, Fair Housing Act and specifically  
21 redlining.

22 So redlining, as the court knows, is when a lender  
23 provides either unequal access to credit or unequal terms of  
24 credit specifically because of race, national origin or  
25 other prohibited characteristics.

1           Generally, there are two ways of proving fair  
2       lending violations, disparate impact, which is essentially  
3       looking at a racially-neutral policy or conduct that has a  
4       disproportionate negative impact on minorities. Disparate  
5       treatment, on the other hand, is all about purposefully  
6       engaging in discriminatory lending. The complaint in this  
7       case did not identify which theory the government was  
8       proceeding under. The allegations, frankly, sound more in  
9       disparate impact, but there is a conclusion that the bank  
10      acted willfully, so it was -- that's why we covered both  
11      theories in our opening brief. And, of course, the  
12      government now has disclaimed any reliance on disparate  
13      impact. And so we are only dealing with, and, of course,  
14      that's what I am going to talk about this morning, the  
15      disparate treatment theory, which obviously has a much  
16      higher bar in terms of both pleading and proof.

17           And so it's interesting in this case, which  
18      requires factual allegations of racially-motivated conduct,  
19      that there is no allegation of any borrower ever being  
20      denied credit. There's no allegation of any borrower,  
21      minority borrower, getting unequal or disparate terms of  
22      credit. There is no allegation of predatory lending.  
23      There's not even any borrower identified. In fact, there is  
24      simply no discriminatory conduct by KleinBank alleged in the  
25      complaint. And there is a reason for that, and the reason

1 is that never happened.

2 So let's look at what the complaint actually does  
3 allege, and there's essentially four categories. And I'll  
4 circle back and talk about each one of them, but  
5 overview-wise the first and foremost allegation is that  
6 KleinBank had a, quote, discriminatory CRA assessment area;  
7 second, that no branches of the bank were located in  
8 majority-minority census tracks, and I'll talk a little bit  
9 more about what that means; third, that marketing was  
10 featured within a radius of the branches; and, lastly, that  
11 the government's analysis of data available through HMDA --  
12 it's a statute, Home Mortgage Data Act, and so there is  
13 publicly-available data called HMDA data on mortgage  
14 applications and originations. They looked at this and  
15 concluded that KleinBank had fewer minority -- well, no, I'm  
16 going to take that back -- fewer applications and origins in  
17 certain geographic areas that would be in the expanded  
18 assessment areas, they call it, that would include  
19 Minneapolis and all of Ramsey County.

20 Our view, judge, is that these are classic  
21 disparate-impact type allegations, they are racially neutral  
22 on their face, and that they fail in this case because it's  
23 a disparate treatment theory, and you need factual  
24 allegations from which a plausible inference can be drawn  
25 that the bank acted out of racial considerations in making

1       lending decisions.

2               The *Gallagher against Magner* case, Eighth Circuit  
3 case from a few years ago, I think kind of illustrates the  
4 difference between the two theories and the high bar that's  
5 required. In that case, of course, both the district court  
6 and the Eighth Circuit said the allegations are not enough  
7 for disparate treatment, even though there were allegations  
8 in a very long complaint about certain groups being  
9 overwhelmingly minority that were being marginalized and  
10 certain comments by certain city officials that would have  
11 supported, arguably, an inference of racial animus. So that  
12 case went off only on disparate impact.

13              So let's talk about the four areas. Assessment  
14 area. Maybe just a brief word about the legal basis for  
15 this. The Community Reinvestment Act, that's the CRA,  
16 requires banks to identify their marketplace and that  
17 becomes their assessment area. And it's important because  
18 that has to reflect reality, because once you designate an  
19 assessment area the FDIC is going to evaluate your  
20 performance every time it comes out for an exam in that area  
21 and, specifically, they are going to look at, among other  
22 things, whether you are serving the credit needs of all of  
23 the constituents in that area, and it cannot be  
24 discriminatory. That's right in the exam protocol, and we  
25 cite this in the brief. It's R.9.

1           So how did KleinBank draw its assessment area?  
2           And I'm going to step back a few years. Klein Financial is  
3           a holding company, a family-owned holding company, which  
4           owned roughly nine charters prior to 2005, nine bank  
5           charters. In 2005 those were merged. Each had its separate  
6           assessment area, but they were all combined in 2005 to  
7           create the current assessment area, with certain tweaks.  
8           There were a few tweaks made in -- could you put that up?  
9           There were a few tweaks made in 2007, but it was mainly just  
10          to fill in some gaps and some holes.

11                 Could you pass that up to the judge?

12                 THE CLERK: Sure.

13                 MR. LUNDQUIST: Government, you have copies of  
14          this.

15                 MR. BELEN: Yeah, Your Honor. For the record,  
16          they gave us copies five minutes before the hearing, so I do  
17          have a copy to look at.

18                 THE COURT: Okay.

19                 MR. LUNDQUIST: We discussed these very maps for  
20          two years.

21                 So, essentially, you have the headquarters back  
22          here in Chaska in Carver County. The dots here reflect the  
23          branch offices of KleinBank. And you can see that -- and  
24          let me further explain that the assessment areas in the  
25          bright colors, the light colors for the City of Minneapolis

1 and Ramsey County are not included. All right?

2 And then we also have from the 2010 census, which  
3 is the basis for the numbers in the government's complaint  
4 and their theory, we have color-coded the census tracks by  
5 minority concentration with these colors indicated in the  
6 upper right-hand corner.

7 Significantly, you can see that all of KleinBank's  
8 branch offices are in the west. They are all west of  
9 Minneapolis. The furthest east you go is probably Savage,  
10 down here on the bottom. Savage, of course, is in Scott  
11 County, but it's right on the border of Dakota County. And  
12 so KleinBank included in its assessment area all of Dakota  
13 County, even though the coverage is only from Savage. And  
14 the reason for that is there's a presumption when you have a  
15 low population area to include whole geographic areas, such  
16 as Dakota County, and so that's what they did here.

17 Similarly, in Anoka County, the eastern-most  
18 office is in Coon Rapids, which is directly north of the  
19 westerly border of Minneapolis. Nevertheless, all of Anoka  
20 County was included, because it's a relatively low  
21 population area. All right?

22 And then we have a business office down here in  
23 Edina, a business lending office, that is essentially south  
24 of the westerly border of Minneapolis.

25 So you can see that the C that the government



1 points to really is only because they included Anoka and  
2 Dakota County in the assessment area, even though all of  
3 their offices are in the west metro area.

4 KleinBank obviously has a long history of  
5 operating in those markets. They are all in the west, and  
6 they are all relatively small markets. That is KleinBank's  
7 niche and always has been. That is the business reason why  
8 these locations are where they are, it's the business reason  
9 why the assessment area is what it is, and it's race  
10 neutral.

11 But even without being in Minneapolis or Ramsey  
12 County, KleinBank has substantial coverage of  
13 majority-minority census tracks. KleinBank covers 19 of the  
14 58 majority-minority census tracks in Hennepin County.  
15 That's over 30 percent. Even without being in Minneapolis.  
16 And you can see there's a cluster up here next to the Maple  
17 Grove office and there are several down here near the  
18 business office in Richfield. You don't need to be in  
19 Minneapolis to serve minority communities.

20 This line that we are talking about, the so-called  
21 redlining, the line that draws the assessment area for  
22 KleinBank, is around a political subdivision, that is, the  
23 City of Minneapolis. That's what's excluded. It's drawn  
24 pursuant to the law. And that's in paragraph 17 of the  
25 complaint that it talks about lines being drawn to reflect

1 political subdivisions, particularly when they are large  
2 metro areas. KleinBank's strategy has never been to enter  
3 into Minneapolis or St. Paul. Nevertheless, the line is not  
4 drawn around these other areas, which it could be; and if it  
5 were, I would submit the government might have a credible  
6 claim of redlining, but it's around the political boundary,  
7 which is totally legit.

8 And, by the way, when I say 19 out of 58, you  
9 don't have to take my word for it. That's in paragraph 20  
10 of the complaint.

11 So this reflects, this assessment area, a  
12 race-neutral decision consistent with KleinBank's  
13 decades-long history of serving small markets, primarily in  
14 the west.

15 There's another reason, dealing with this  
16 assessment area still, why the government's argument fails,  
17 and that is excluding all of Minneapolis and St. Paul cannot  
18 possibly constitute redlining, and that is because both of  
19 those cities, or you can look at it either as the City of  
20 St. Paul or all of Ramsey County and Minneapolis, however  
21 you want to slice it, those areas are all majority-majority  
22 areas. So it is literally impossible to have any kind of  
23 disparate treatment. And we cite the census information in  
24 footnote 6 of our brief for this.

25 So basically disparate treatment, disproportionate

1 treatment is impossible, because it's a majority-majority  
2 area that the government is complaining about, rather than  
3 focusing on certain neighborhoods that they think we should  
4 be in. They say we should be in that entire huge area.

5 So if anyone is disadvantaged in the City of  
6 Minneapolis by having to drive out to Chaska to get a loan  
7 at KleinBank, it's most likely going to be a Swede or  
8 another member of the Caucasian majority, which are not  
9 obviously a protected class.

10 But I'm not going to stop there, because at the  
11 same time anybody who applies for a loan, and they often do  
12 this on the internet from Wisconsin and eastern locations,  
13 will not be turned away if they are from Minneapolis. And  
14 the proof of that is in Exhibit B to the complaint, where  
15 they have got all the dots showing where the applications  
16 come from. There's no showing that there ever was any kind  
17 of refusal based on the geography.

18 So on the assessment area our position is it's  
19 simply not plausible to take a race-neutral map, such as  
20 this, and draw a plausible conclusion that KleinBank had  
21 racial animus when it located itself the way it did. It  
22 just doesn't fly.

23 The branch locations is the second area, judge.  
24 We already discussed where the branches are and why. They  
25 are all west of Minneapolis. They are small markets, which

1 is exactly where you would expect to see a community bank.  
2 There's no legal requirement that has been cited and  
3 certainly none that we're aware of that requires a bank to  
4 locate itself in a large metro area just because it's in the  
5 suburbs around it.

6 There is a big qualification to what I just said,  
7 though, and that is this: Whenever a bank that's under the  
8 control or the regulation or supervision of FDIC opens or  
9 closes a branch, they have to get permission from FDIC to do  
10 so. And so every time one of these branches open, FDIC had  
11 to weigh in and say it was okay, it would be consistent with  
12 the law, consistent with safe and sound business practices  
13 and in accord, of course, with their business plan.

14 So, again, nothing in these race-neutral locations  
15 is discriminatory. All the constituents are well-served.  
16 No one has ever claimed the contrary. In fact, the Maple  
17 Grove location is about three miles from a very heavy  
18 majority-minority area of suburban Minneapolis. The  
19 business office, as I pointed out, is adjacent to a  
20 majority-minority area. So just on the face of the  
21 complaint, and the complaint references the same locations,  
22 it doesn't fly.

23 So as we argued in our opening brief, we don't  
24 believe these allegations suffice under a disparate impact  
25 theory. They certainly don't even come close for disparate

1 treatment.

2 Marketing, the third topic. Again, no plausible  
3 inference can be drawn that marketing decisions were  
4 race-based. You know, there's two things that the complaint  
5 says, judge. One is that the bank failed to, quote,  
6 unquote, "meaningfully market in majority-minority tracks."  
7 Well, put aside the fact that most of the advertising is  
8 electronic and it covers everything. This allegation  
9 doesn't provide notice of anything. Presumably, if they say  
10 it is not meaningful, they mean we have done some, but not  
11 enough in their view, that simply doesn't rise to the level  
12 of plausibility.

13 The other allegation is that marketing is alleged  
14 to be around a radius of each branch. Of course, it is.  
15 That's how you would advertise. If a branch is going to  
16 advertise, it is going to pitch its geographic area. So it  
17 doesn't add anything to what we have already discussed about  
18 branches. Those are business decisions. There's no  
19 evidence, other than pure speculation, that race had any  
20 basis in these decisions.

21 Lastly is the government's discussion of data,  
22 which is a classic area for disparate impact and not  
23 treatment unless, as we point out, the disparity is so stark  
24 that it is overwhelming, like in the *Arlington Heights* case  
25 where there was a 99 percent discordance or the *Yick Wo* case

1 where it was 100 percent denials. There you could draw an  
2 inference.

3 But there's lots of problems with the government's  
4 numbers. First, we need to recognize that these numbers do  
5 not even reflect minority applications and minority  
6 originations. They only reflect neighborhoods. And the  
7 neighborhoods that they are looking at are 50 percent or  
8 more minority. So there's a 50/50 chance that it could be a  
9 majority borrower in those neighbors, which could skew the  
10 data any number of ways.

11 Of course, KleinBank's numbers are going to be  
12 lower when you include areas that they have never been in.  
13 The same would be true if you looked at Wisconsin. We're  
14 going to have different numbers, because they don't operate  
15 in those geographic areas.

16 But the interesting thing is even if you do credit  
17 the government's numbers and also conclude that KleinBank  
18 had some heretofore unknown duty to penetrate all of  
19 Minneapolis and St. Paul, we could still match the alleged  
20 peers, the undisclosed peers that operate in these areas,  
21 with only 29 more originations a year, a low number in the  
22 overall scheme of things, and without even opening up a  
23 branch in that area. So the numbers are such that it's not  
24 plausible to draw a racial motive. It just doesn't -- they  
25 are not compelling.

1           And I can see your brow was furrowed slightly.  
2           The analysis of the 29 is in our brief, so I won't bore  
3           everybody with trying to calculate that.

4           The other thing that's interesting is that there's  
5           not a complaint or an allegation about a single denial from  
6           these areas. And let's talk about denials for a second. If  
7           we, again, look at the numbers in the complaint, and the map  
8           is in the brief, KleinBank has a better batting average than  
9           the alleged peers. And what I am talking about is the ratio  
10          of taking minority applications and converting them into  
11          originations, in other words, funding the loan. So  
12          KleinBank has an 82 percent minority track, actually, not  
13          minority borrower, conversion rate, taking these  
14          applications and actually funding them, versus the peers who  
15          operate in these areas at 75 percent. That is totally  
16          inconsistent with any kind of racial animus. It just makes  
17          no sense.

18          Lastly, let me just briefly say a few words about  
19          the FDIC exam reports. And the first thing I want to say is  
20          that these are relevant --

21                 THE COURT: Before you do --

22                 MR. LUNDQUIST: Yeah.

23                 THE COURT: -- let me ask this, which is, On a  
24          12(b)(6) motion can I even consider that?

25                 MR. LUNDQUIST: Absolutely.

1 THE COURT: Because?

2 MR. LUNDQUIST: Because the government has made an  
3 allegation that when KleinBank has been examined over the  
4 years no redlining exam was made. That is wrong. And I'll  
5 talk -- I'll talk about the why it's wrong in a minute. But  
6 they make a statement about the exams, which opens up the  
7 exams. It's like they are incorporated by reference. And  
8 we are showing that that allegation is flat-out wrong.

9 THE COURT: Okay.

10 MR. LUNDQUIST: But here's the first point. These  
11 exam reports are not just relevant for the due process  
12 argument. They are extremely relevant for the plausibility  
13 analysis. And the reason why I say that is it is not  
14 plausible that you would have XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
15 XX  
16 XX  
17 XX  
18 XX  
19 XXX only to have the  
20 government take that same data -- nothing is hidden here.  
21 It's not like you got some informant saying here is what the  
22 real skinny is. This is all out there in the public domain.  
23 It is not plausible that they can come in and say that the  
24 FDIC has been wrong all of these years.

25 So here are the facts. And I'm going to be



1 somewhat elliptical and high level, because I have learned  
2 in this case that the FDIC takes this confidentiality issue  
3 really seriously, so I don't want to violate that. We all  
4 know the FDIC regularly examines banks, including KleinBank.  
5 I don't think anybody has an issue with that. And they do  
6 so by following very well-established written protocols that  
7 we cited in our brief. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

8 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
9 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
10 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
11 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
12 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
13 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
14 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
15 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

16 XXXXXXXX It's the same information, once again, that the  
17 department is talking about. XXXXXXXXXXXXXXXXXXXXXXXXXXXX  
18 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
19 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

20 XXXXXXXXXXXXXXXX So when they say there is no redlining  
21 exam, it's extremely misleading, XXXXXXXXXXXXXXXXXXXXXXXX  
22 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX And as  
23 the court is aware, you need the FDIC's blessing to continue  
24 to operate your bank. They can close you down if you don't  
25 comply with the law and if you don't operate in a safe and

1 sound fashion.

2 On the other hand, when they come out and issue an  
3 exam report and the whole board of directors looks at that  
4 every time, they have to sign off on it, you are allowed to  
5 continue to operate. XX  
6 XX  
7 XX  
8 XX  
9 XX  
10 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

11 So the bank, of course, continued on the same path  
12 it had been on for years and continued to have that  
13 assessment area, continued to have these branches. There's  
14 some tweaks that are made over the years. They continued to  
15 do everything that they always did to comply with fair  
16 lending law, XX  
17 XX

18 Our claim, size of plausibility claim, is that it  
19 violates due process to go back in time and say that the  
20 FDIC's guidance to the bank was in error and we're going to  
21 punish you for relying on that guidance. It would be one  
22 thing to say going forward you need to be in Minneapolis.  
23 Okay. We can talk about that. But to go back in time, have  
24 this court adjudicate violations of law, impose civil money  
25 penalties, is punishment for doing something XXXXXXXXXX

XX  
XX

It's particularly offensive I think when there is no law, no regs giving notice that you have to be in a major metropolitan area when you have operated in the western suburbs for decades. No one has ever said that to the bank, not in the law, not in the FDIC. So you can call it estoppel. You can call it retroactivity. You can call it lack of notice. It's all the same. It's a violation of due process to punish someone for doing what the government told to do.

And we cited *Cox*, a venerable Supreme Court case, where a police officer said to a protester, "You can be here. That's fine," and then someone else comes by and says, "You can't be here, and I'm going to arrest you for being here." That doesn't fly. It's not the way this country works.

And a little closer to home, we have got the *Consumer Finance Protection Board* case that was vacated, the D.C. case, on other grounds, but they have got a great quote that we put in our brief about changing the rules retroactively. It's not fair, and it's not the way our country runs.

So, in conclusion, Your Honor, the four areas that the government talks about in the complaint are race

1 neutral. There's no plausible inference that can be drawn  
2 that these guys acted to discriminate against minority  
3 borrowers. And due process would be offended if the  
4 government was allowed to go back in time and change the  
5 rules of the game.

6 So unless the court has any questions, I will sit  
7 down.

8 THE COURT: Okay.

9 MR. LUNDQUIST: Thank you.

10 THE COURT: Thank you.

11 Mr. Witt, did you have anything you wanted to add?

12 MR. WITT: Yes. Thank you, Your Honor.

13 May it please the court. I am Joseph Witt,  
14 President and CEO of The Minnesota Bankers Association and  
15 lead attorney for amici curiae, the Bankers Associations.

16 This group of associations is noteworthy. We  
17 assembled 41 state-based banking trade groups, plus the two  
18 largest national banking trade groups, the American Bankers  
19 Association and the Independent Community Bankers of  
20 America. Collectively, we represent over 95 percent of our  
21 nation's banks. This large group of associations is a  
22 testament to the fact that this lawsuit has caused great  
23 concern for the banking industry. I want to thank the court  
24 for allowing us to both participate in this case and make  
25 some comments today.

1           The banking industry is heavily regulated, subject  
2           to thousands of pages of laws and regulations. All those  
3           laws and regulations are actively enforced by the bank  
4           regulatory agencies through regularly-scheduled bank  
5           examinations. Bankers need to know the rules, and they need  
6           to understand how they are enforced. The bankers are  
7           concerned about this lawsuit because it appears to be a  
8           significant departure from their understanding of the  
9           anti-discrimination laws and regulations and the fair  
10          lending examination procedures, as explained in our brief.

11          Today I want to focus on the bankers' main  
12          concern, namely, that the government has filed this  
13          redlining lawsuit with no facts and no evidence that the  
14          bank made decisions about its market area because of race or  
15          national origin.

16          Like all disparate treatment claims, there are two  
17          things the government must prove in a redlining case.  
18          First, the government must show a disparity. The defense  
19          has laid out the arguments as to why there isn't really a  
20          disparity in this case, but the banks are really scared when  
21          they see this particular complaint.

22          Like all community banks with limited resources,  
23          KleinBank cannot be all things to all people. Therefore, it  
24          serves part of the Twin Cities metropolitan area and it does  
25          not serve other parts of it. Specifically, the complaint

1 notes that there are majority-minority neighborhoods outside  
2 KleinBank's assessment area, leading to a disparity based on  
3 race or national origin. There are lots of banks in that  
4 situation. There are Minneapolis banks that don't serve the  
5 minority neighborhoods in St. Paul; likewise, there are St.  
6 Paul banks that don't serve the minority neighborhoods in  
7 Minneapolis. And that situation exists all over the  
8 country.

9 We agree with the defense that it doesn't state a  
10 disparity; but even if it did, pointing out that disparity  
11 alone does not prove a legal discrimination. The government  
12 must also meet the redlining causation standard. The  
13 complaint must include facts and evidence that the bank made  
14 decisions about its trade area because of race or national  
15 origin. While the complaint includes some inferences and  
16 some conclusions, it includes no facts supporting the  
17 inferences and no evidence proving the conclusions. For  
18 example, consider paragraph 16 of the complaint. It reads,  
19 quote, "KleinBank's unlawful consideration of race and  
20 national origin in its business practices is evident from  
21 the assessment areas that the bank established and  
22 maintained pursuant to the Community Reinvestment Act, the  
23 CRA," unquote. That conclusion is wholly unsupported.  
24 Unlawful consideration of race is evident from a map? Can a  
25 map prove why a bank made its decisions? Can a map prove

1 all the factors the banks considered when making its  
2 decisions? Absolutely not. A map may be able to show a  
3 disparity, but it does not prove illegal discrimination.

4 Like nearly all disparate treatment cases,  
5 redlining cases are decided based on whether the government  
6 can prove that the bank made decisions based on race or  
7 national origin as opposed to making its decisions based on  
8 valid business reasons. The fair lending examination  
9 procedures we discussed in our brief explain -- explain the  
10 two court-approved types of evidence the government can use  
11 to meet that causation standard, namely, overt evidence and  
12 comparative evidence. The government's complaint did not  
13 allege either of those two types of evidence.

14 In conclusion, the redlining definition includes a  
15 causation standard. If the government can survive a motion  
16 to dismiss simply by stating a disparity, without needing to  
17 prove why the disparity exists, the banking industry is at  
18 great risk. That result cannot stand. It is inconsistent  
19 with the plain language of the fair lending laws and  
20 regulations, and it is counter to the government's own fair  
21 lending examination procedures.

22 Because the government failed to properly plead  
23 the facts needed to prove that the bank made decisions about  
24 its trade area because of race or national origin, we urge  
25 the court to rule that the complaint fails to state a claim

1 and we urge the court to grant KleinBank's motion to  
2 dismiss.

3 Thank you again for this opportunity to address  
4 the court.

5 THE COURT: Okay. Thank you.

6 Mr. Belen.

7 MR. BELEN: Good morning, Your Honor. I am  
8 Christopher Belen. I'm an attorney at the Department of  
9 Justice in the Civil Rights Division, and I thank you for  
10 the opportunity to address the court as well.

11 It's been a long time since KleinBank has been a  
12 small rural community bank. As the map that Mr. Lundquist  
13 walked through, they have made choices. They have expanded.  
14 They have gotten closer and closer to the borders of  
15 Minneapolis. They have gone up around the north. They have  
16 gone to the south and even around the southeast, but not in  
17 the city. It has been a long time since they have been a  
18 rural bank. Even without lending explicitly, intentionally  
19 inside the cities, they are still the fourth largest bank in  
20 the metropolitan area. This is not a small bank.

21 The choices that KleinBank made are the basis for  
22 our complaint. This is a disparate treatment claim. We  
23 allege that the bank made choices, a variety of different  
24 choices, which I will walk through today, and it's those  
25 choices which reflect an intentional discrimination.



1           As this court knows, we are here on a Rule  
2       12(b)(6) motion. That is very important. And I'm going to  
3       spend quite a bit of my time, Your Honor, if you don't mind,  
4       talking about the proper pleading standard, talking about  
5       what this court actually is deciding today, as opposed to a  
6       summary judgment motion, which may be in the future, because  
7       I think that is really the crux of this.

8           A lot of the things that both KleinBank and the  
9       amicus representative brought forth to this court are  
10      legitimate business reasons, their explanations for why a  
11      bank did this or that. They are alternative hypothetical  
12      ways to look at the statistics. That is what summary  
13      judgment is for. That is what discovery is for.

14          As Your Honor knows, the pleading standard is  
15      pretty straightforward. We need to have facts in the  
16      complaint, that those taken with reasonable inferences drawn  
17      therefrom give rise to a plausible claim; that if the things  
18      said in our complaint are true, it is a plausible claim of  
19      disparate treatment under the Fair Housing Act and Equal  
20      Credit Opportunity Act.

21          The courts have said time and time again in  
22      disparate treatment cases that this is still a fair notice  
23      pleading standard. It is not a, quote, "much higher  
24      pleading standard," as Mr. Lundquist said. This is fair  
25      notice. And I find it interesting that the defendant here

1 said that they do not have fair notice of the claims, but  
2 yet spends their brief and spends this morning talking about  
3 its defenses. It's able to articulate its defenses for why  
4 it did this or why it didn't do that, but then it claims, as  
5 it must, under 12(b)(6) that it lacks fair notice. It  
6 doesn't even know what our claims are, which is the question  
7 this court must answer on 12(b)(6).

8 On that same point, the bank talks about the FDIC.  
9 And I will get to the estoppel argument, I will get to these  
10 exhibits outside the pleadings, but first I want to pause,  
11 because the reply brief that KleinBank filed here contains  
12 two statements that are very important when it comes to the  
13 fair notice that it has. First, it says that it can tell  
14 that the FDIC looked at -- was aware of, quote, "the same  
15 facts." That's page 4 of their reply brief. Page 7 they  
16 say they look at the FFIEC, the procedures, the guidelines  
17 for investigators at regulatory agencies, and it says that  
18 those same indicators, those same risk factors, are what are  
19 at the, quote, "heart of the government's allegations" in  
20 this case. So it can tell when the FDIC looks at the same  
21 facts or looks at the same factors that that would be  
22 sufficient to perform a redlining exam or have a redlining  
23 analysis; but when we have the same facts in our case, when  
24 it is at the heart of our complaint, that somehow is not  
25 sufficient to even give it fair notice. That's

1 inconsistent.

2 The case law that the defendants cite in their  
3 brief for what would be the proper pleading standard has  
4 several flaws, mainly because a lot of the cases are summary  
5 judgment cases, a lot of those cases, that is, you know,  
6 *Hager, Gallagher*, Eighth Circuit decisions. And that's an  
7 important distinction because, as Your Honor knows, that is  
8 with the benefit of evidence, that is with the benefit of  
9 the burden-shifting analysis has already -- has the  
10 opportunity to occur. And that is the proper standard here,  
11 *McDonnell Douglas*, Title VII case law, as Your Honor I am  
12 sure is aware. That is the same approach that is taken  
13 here, that the plaintiff, the United States, must have those  
14 facts that, if proven, would be a prima facie case and then  
15 the defendant can come in and present its defenses.

16 Indirect evidence of discrimination is okay for a  
17 redlining case. The cases the defendant cite even say that.  
18 That's *Gallagher* again. That's *Brown v. Ameriprise* that's  
19 decided by this court, *Folger* decided by this court. It  
20 does not need to be overt evidence of discrimination, does  
21 not need to be a smoking-gun email, especially at the  
22 pleading stage, Your Honor.

23 And I want to take issue with one thing Mr.  
24 Lundquist said at the very beginning, which is that there  
25 are two ways to prove discrimination. He said disparate

1 impact and disparate treatment. Well, actually, there are  
2 three ways. One is overt evidence, and then it's disparate  
3 treatment, and then it's disparate impact. But what the  
4 defendant is doing here is condensing overt discrimination  
5 and disparate treatment and acting as if disparate treatment  
6 somehow has to meet that higher burden and has to have  
7 that -- that smoking gun email, has to have that expressed  
8 dislike.

9 I stopped counting, but Mr. Lundquist said several  
10 times racial animus. The courts have repeatedly said racial  
11 animus is way beyond what is required for intentional  
12 discrimination. Intent is not a racial animus. It is  
13 making decisions, in this case, in a redlining case, that  
14 deliver unequal access to residents of a neighborhood based  
15 on the racial composition of that geography. Racial animus  
16 is too far. And the fact that we are still hearing that  
17 phrase I think again indicates that the pleading standard  
18 the defendant wants this court to adopt is entirely  
19 incorrect.

20 They also cite zoning cases, where the  
21 burden-shifting framework in *McDonnell Douglas* do not apply.  
22 That's *Ave. 6E*, the case they cite.

23 What the court, the Eighth Circuit and this court  
24 and the Supreme Court have repeatedly rejected at the  
25 12(b)(6) stage is when defendants say that we must -- the

1 plaintiff in a discrimination case must prove, we heard that  
2 word several times this morning as well, we must prove in  
3 our complaint the intent, that there was this decision,  
4 racial animus. That is not correct in the decisions that we  
5 have cited. Supreme Court, Eighth Circuit stand for that  
6 proposition.

7 So what facts are sufficient? The defendant  
8 walked through the types of evidence, the types of factual  
9 allegations that we have put in our complaint. And it is  
10 not just statistics. It is not just the CRA assessment  
11 area. It is not just the branch locations. It is not just  
12 the marketing. It is all of it taken together. And when  
13 they -- they go and they pick at one, they pick at the  
14 other, I understand that's what they should do and that's  
15 what summary judgment again would be for, but to say that we  
16 do not have -- we have not given them fair notice of the  
17 types of our allegations and the types of support for our  
18 claim is simply not true.

19 And it is not just a statistics case, as Mr.  
20 Lundquist pointed out. This is not a disparate treatment  
21 theory that we are advancing. But the statistics support  
22 and they are one element of our allegations. And they may  
23 disagree with our statistics. They may think that they  
24 could calculate it a different way. Again, that's what, you  
25 know, they will be able to do in discovery and they will be

1     able to present that and the court could agree with them  
2     instead. But to say that this whole case should be  
3     dismissed because we have statistics is simply not correct.

4             Again, I come back to what they said in the reply  
5     on page 4 and page 7. They say that we have the same -- the  
6     same facts as the FDIC was aware of. Well, if that's what  
7     is in our complaint, but somehow that is not sufficient for  
8     redlining, but when the FDIC has those same facts, that is  
9     so sufficient that it's enough to stop the attorney general  
10    from exercising his independent authority, something is  
11    inconsistent there.

12            We also do not base our allegations on an  
13    assumption or an assertion that they must be lending to both  
14    Minneapolis and St. Paul, every corner of that. We have  
15    allegations in our complaint in paragraphs 32 and 35 that  
16    show the shortfalls, the racial disparities by KleinBank  
17    within their CRA assessment area, the part of this area, the  
18    part of the metro area that they claim that they are going  
19    to serve. They are -- they have racial disparities. They  
20    are treating majority-minority census tracts differently  
21    than the majority white tracts inside their assessment area.  
22    So even if this court were to say that the assessment area  
23    is fine, they don't need to change it, injunctive relief in  
24    that regard is not necessary or appropriate, they still  
25    cannot explain those disparities. And that is a factual

1 allegation in this complaint that, if true, would support a  
2 plausible claim, even setting aside our arguments about  
3 their assessment area and the fact that they have drawn a C  
4 or a horseshoe, however you want to describe it, around the  
5 urban areas in this metropolitan area.

6 One other thing that Mr. Lundquist points out, and  
7 he said this in their briefs as well, is that, well, our  
8 assessment area does have majority-minority districts,  
9 census tracks. And, clearly, there are some, as he pointed  
10 out the numbers, in Hennepin County; but when that line was  
11 drawn, they weren't there. So, again, as we develop this  
12 case through discovery, I think this court will see, and the  
13 allegations stand on their own, but to now say that they  
14 somehow get the credit for the ones that they do have in  
15 their assessment area misses the point, first of all, again,  
16 because they aren't serving those communities that are  
17 inside their assessment area at the same level as the other  
18 parts of their assessment area, as well as in comparison to  
19 other lenders in the area.

20 One other case that the defendants have cited is  
21 this *Hager* decision. That is a situation where the facts  
22 were so speculative and that there was no -- there were no  
23 allegations at all of different treatment across the  
24 protected classes, and I think the court needs to be mindful  
25 that that demonstrates the difference between our complaint.

1 Our complaint does have paragraph upon paragraph of the  
2 differences based on the racial composition in the  
3 neighborhoods, and it shows why this is more than enough for  
4 Rule 12(b)(6).

5 One other point that the defendants have raised is  
6 the issue of our statistics. And as I said at the outset,  
7 you know, this is not a case where we are only relying on  
8 statistics. And that is important for the court to not only  
9 understand, but recognize that the arguments that they are  
10 making challenging our statistics or even the fundamental as  
11 a matter of law statistical analysis alone would not be  
12 sufficient.

13 The *Gallagher* decision that they cite, as well as  
14 the *Ricketts* decision that is in the briefs, you know, talks  
15 about that statistics alone would not be enough, except in  
16 rare circumstances where it would be so stark. That is not  
17 the case here. It is completely inapplicable here, because  
18 it is not racial disparity shown in statistics alone. There  
19 are other types of evidence that we have alleged. It is not  
20 inconsistent at all, therefore, that we can cite statistics  
21 that bear out what we have seen in the other aspects of our  
22 complaint, the branch locations, the marketing, et cetera,  
23 as well as the CRA assessment area.

24 We are not seeking in this case, I mean, just to,  
25 you know, address any concern that the court has, especially



1 at this stage, Your Honor, this is not -- the court does not  
2 need to decide if that as a matter of law a government  
3 agency can tell a bank that you must, or tell all banks,  
4 more importantly, that you -- you must be in every city.  
5 That's not what we are saying. We are not saying that, you  
6 know, if they include this part or that part that then  
7 everything would be fine. That is the opposite, that is the  
8 inverse of what we are saying in our complaint. What we are  
9 saying is that this map reflects the decision that they have  
10 made. And they have made decisions that have drawn a C, as  
11 Mr. Lundquist says, right around the boundaries of the  
12 cities. They claim that, well, we have always been a  
13 suburban bank, that's what we want to be. You know, that  
14 again is a business reason to be addressed at summary  
15 judgment, but that again indicates that there were decisions  
16 made about where to go and where not to go. And as we show  
17 that when you then compare it to the majority-minority  
18 census tracks even within inside, even inside the CRA  
19 assessment area, where they aren't lending, they aren't  
20 originating the loans at the same levels, then that is where  
21 all of this evidence together at least gives the inference  
22 that they are making decisions based on the racial  
23 composition of the neighborhoods, and that's a plausible  
24 claim for redlining.

25 And I want to address the differences between fair

1       lending and redlining. There are many different kinds of  
2       fair lending issues. Some of the documents we have seen in  
3       here refer to other ones, such as loan underwriting  
4       decisions, and Mr. Lundquist talks about that. He talked  
5       about it this morning about how, well, there are no  
6       allegations that we actually gave different terms to people  
7       of color versus white folks. That's not in here because  
8       that's not the case that we have brought. This is a  
9       redlining case. This is a case where they have made  
10      decisions to not serve geographic areas based on the racial  
11      compositions. So don't -- we don't want the court to see  
12      the blurring of the lines there, because that is very  
13      important when you look at what the FDIC did or didn't do  
14      and the assumptions that the KleinBank wants you to draw at  
15      this stage.

16               As Mr. Lundquist indicated, they have kind of  
17      walked back what they have claimed the FDIC did in their  
18      reply brief. XX  
19      XX  
20      XX  
21      XX  
22      XX  
23      XX  
24      XX  
25      XX

1           What we allege in our complaint, paragraph 13, is  
2           that the FDIC did not conduct a redlining exam. And they  
3           may disagree with that. I'm not sure if they even disagree  
4           with that anymore. But even if they disagree with that, at  
5           a Rule 12(b)(6) stage, Your Honor, it must be accepted as  
6           true.

7           To the extent they have filed extraneous exhibits,  
8           to the extent that they're talking about what a different  
9           federal agency did, to the extent they try to contradict our  
10          factual allegation, those are matters outside the pleadings.  
11          He says this morning that, no, actually, the government is  
12          incorporated by reference. That is not what we did. We  
13          said the opposite of what he is saying. He is trying to  
14          contradict. He is trying to put documents in evidence that  
15          would -- would oppose what we have said.

16          And the case law is very clear on this, even the  
17          cases they cite. *BJC Health System*, Eighth Circuit, said  
18          that if it's offered, quote, "in opposition to the pleading  
19          it cannot be considered." *Kushner*, a case they cite, Eighth  
20          Circuit. The court actually declined to consider it,  
21          because the documents were offered for the truth of the  
22          matter, which is exactly what they are doing here, and the  
23          opposing party disputed the facts and the inferences that  
24          the propounding party offered them for. *Dunnigan*. This  
25          court in 2016 said any -- the documents that are offered for

1 contradictory or supplementary purposes may not be  
2 considered at the Rule 12(b)(6) stage. Those documents,  
3 Your Honor, don't even say what FDIC -- what KleinBank even  
4 claims they did.

5 XXX

6 XXX

7 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX And, as a matter of law, the  
8 fact that the FDIC, even if, even if, Your Honor, you assume  
9 and you take for truth what the defendant here says, which,  
10 of course, is not the proper thing to do at a Rule 12(b)(6)  
11 stage, but even if you took it for truth, as a matter of law  
12 it would not prevent the attorney general from exercising  
13 his separate independent statutory authority.

14 Mr. Lundquist referred to the FDIC as the folks  
15 who are experts and who are charged by law to bring fair  
16 lending cases. The same is true of the Department of  
17 Justice. And the assumptions that would have to be made,  
18 the acceptance of facts, none of which are in the record,  
19 Your Honor, in order to address this issue of due process,  
20 of estoppel, of fairness, is not -- is premature, because we  
21 would have to know what the FDIC actually looked at, the  
22 type of data, what analysis did they actually conduct, what  
23 did they find, what conclusions did they draw, what  
24 statements were actually made, what are the full contents of  
25 the statements that were made to this defendant, what did

1 the defendant do in reliance, what other information was  
2 available to the defendants so that they did their own due  
3 diligence, even if the FDIC told them one thing, what data  
4 did they have that maybe indicated something else and was  
5 that reasonable. Those are all things that would need to be  
6 established, none of which are here, none of which certainly  
7 rise to the level of estopping the attorney general from  
8 exercising his statutory authority. It's a sticky legal  
9 issue, this issue of estoppel, of what role, if any, the  
10 FDIC's research, examination -- what, if any, it would play  
11 in the de novo review this court will have to do about what  
12 KleinBank did and whether it is a violation of law.

13 So, Your Honor, those are the points that I wanted  
14 to address, and I will just conclude, but, of course, I'm  
15 happy to answer any questions that Your Honor has.

16 You know, this case comes down to those decisions  
17 that KleinBank itself made. It made decisions to expand.  
18 It made decisions to tell the government that it actually  
19 was going to serve these areas around here, and the  
20 allegations we have made is that they haven't done that.  
21 They haven't actually served majority-minority areas inside  
22 their own area. But we also allege, as is exactly what is  
23 the case in redlining, that the area that they are serving  
24 wraps right around areas that are majority-minority and that  
25 decision, those decisions were race-based. And this court

1 can draw those reasonable inferences. And the case law for  
2 disparate treatment that we have cited talks about intent  
3 for discrimination -- for discrimination cases can be shown  
4 through --

5 THE COURT: Is there any significance to the point  
6 Mr. Lundquist made that the redline that you are drawing --  
7 or you are alleging actually encompasses a political  
8 subdivision as opposed to neighborhoods or areas or  
9 residential --

10 MR. BELEN: Your Honor, I think what you are  
11 referring to is the whole geographies. And there are  
12 requirements, again, for CRA purposes, and then I will  
13 transition to Fair Housing Act in a moment. CRA does have  
14 language that tells banks you can't draw an arbitrary line  
15 through whole geographies. Okay? And that's what he's  
16 referring to. That's how he alleges, well, we will do that  
17 for Dakota, we will do that for Anoka County, but we aren't  
18 maybe going to do that for others, because they do draw a  
19 line through Hennepin County. He, you know, points out that  
20 it is close to the City of Minneapolis line. I would submit  
21 from what we see it's not actually the same line and so that  
22 belies his point a little bit. But, again, if you are  
23 excluding -- if you are following a whole geography to move  
24 to Fair Housing Act, or even if you are following a  
25 geographical line, if you are drawing that line on that

1 geographical line because you don't want to serve those  
2 people across the line, that's redlining. So it's one  
3 thing -- you know, I agree with you that, sure, maybe their  
4 defense will be better as we get into discovery when they  
5 say, well, here's why we drew the line, not only do we have  
6 business reasons, but we actually were following political  
7 subdivision lines, and, you know, there was nothing else  
8 there. And then we will say, well, but why did you draw  
9 that one, why didn't you include those neighborhoods that  
10 were right on the other side of the line. And for them to  
11 say -- again, I hear what they are saying. Their defense  
12 is, well, that's not who we are, we have been a suburban  
13 bank. But, again, they have expanded; they are serving  
14 areas right on the other side of that line. And the why you  
15 made that decision is -- this is premature. It's not a  
16 12(b)(6) issue. That under *McDonnell Douglas* is plainly a  
17 summary judgment question. They provide their  
18 nondiscriminatory legitimate business reasons, and the court  
19 has to decide whether that's pretextual, whether it is -- it  
20 is what they say it is.

21 And, again, Your Honor, I keep coming back to the  
22 fact that even inside the line that they drew they aren't  
23 serving majority-minority areas at the same level. So it's  
24 not just a CRA assessment line, which, again, for Your  
25 Honor's benefit, the CRA assessment line is, as Mr.

1 Lundquist says, how are you serving the whole community. It  
2 is aimed at low and moderate income issues. The Fair  
3 Housing Act is race and national origin. So with, for  
4 example, a regulatory agency looks at CRA compliance, they  
5 would not likely be looking at race, because they are  
6 looking at income, they are looking at are you serving the  
7 community. So it's a little -- I mean, case law has -- you  
8 know, CRA and Fair Housing Act are related. I am not saying  
9 they are not. And here we think the way that they drew  
10 their line identifying who they were going to serve and who  
11 they weren't going to serve is an indicia of discrimination,  
12 when that line keeps out majority-minority census tracks.

13 THE COURT: Okay. Thank you.

14 MR. BELEN: Thank you, Your Honor.

15 THE COURT: Anything else, Mr. Lundquist?

16 MR. LUNDQUIST: I think the court has a good  
17 understanding of the issues, so I'll rest. Thank you.

18 THE COURT: Okay. Thank you very much. It is  
19 fascinating argument. I will take the matter under  
20 advisement and issue a ruling shortly. Thank you.

21 (Court adjourned at 10:37 a.m., 9-22-2017.)

22 I, Renee A. Rogge, Official Court Reporter for the  
23 United States District Court, do hereby certify that the  
24 foregoing pages are a true and accurate copy of the  
25 transcript originally filed on February 22, 2018,  
incorporating redactions requested by counsel for defendant  
KleinBank. Redactions appear as "XXXX" in the transcript.

Certified by: /s/Renee A. Rogge  
Renee A. Rogge, RMR-CRR